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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

16 JOHN E. GOLUB, Individually and on Behalf of) CASE NO.: 3:17-cv-06653-WHO
17 All Others Similarly Situated,)
18 Lead Plaintiff,) GIGAMON DEFENDANTS' REPLY
19 v.) IN SUPPORT OF MOTION TO
20) DISMISS
21 GIGAMON INC., COREY M. MULLOY, PAUL)
22 A. HOOPER, ARTHUR W. COVIELLO, JR.,)
23 JOAN DEMPSEY, TED C. HO, JOHN H.)
24 KISPERT, PAUL MILBURY, MICHAEL C.) Judge: Hon. William H. Orrick
25 RUETTGERS, ROBERT E. SWITZ, DARIO) Ctrm: 2, 17th Floor
26 ZAMARIAN, ELLIOTT MANAGEMENT) Date: February 20, 2019
27 CORPORATION, ELLIOTT ASSOCIATES,) Time: 2:00 p.m.
28 L.P., ELLIOTT INTERNATIONAL, L.P.,)
29 EVERGREEN COAST CAPITAL, GINSBERG)
30 HOLDCO, INC., and GINSBERG MERGER)
31 SUB, INC.,)
32 Defendants.)

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STATUTES

2 15 U.S.C. § 78u-5(c)(1)..... 2

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3

2	“¶” or “Complaint”	Consolidated Complaint for Violations of 3 Securities Exchange Act of 1934 (ECF No. 56) filed August 10, 2018
4	“Defendants”	Gigamon, Inc., Corey M. Mulloy, Paul A. 5 Hooper, Arthur W. Coviello, Jr., Joan Dempsey, Ted C. Ho, John H. Kispert, Paul Milbury, Michael C. Ruettgers, Robert E. 6 Switz, and Dario Zamarian
7	“Gavin Decl. Ex.”	Exhibits attached to the Declaration of 8 Elizabeth R. Gavin in Support of Gigamon 9 Defendants’ Motion to Dismiss Consolidated Complaint for Violations of Securities Exchange Act of 1934 (ECF No. 69-1), filed October 12, 2018
10	“Gigamon”	Gigamon, Inc.
11	“Gigamon Defendants”	Gigamon, Inc., Corey M. Mulloy, Paul A. 12 Hooper, Arthur W. Coviello, Jr., Joan Dempsey, Ted C. Ho, John H. Kispert, Paul 13 Milbury, Michael C. Ruettgers, Robert E. 14 Switz, and Dario Zamarian
15	“MTD”	Gigamon Defendants’ Motion to Dismiss 16 Consolidated Complaint for Violations of Securities Exchange Act of 1934 (ECF No. 69) filed October 12, 2018
17	“Opp.”	Lead Plaintiff’s Omnibus Memorandum in 18 Opposition to Defendants’ Motions to Dismiss (ECF No. 73), filed November 30, 2018
19	“PSLRA”	Private Securities Litigation Reform Act, 15 20 U.S.C. §§ 78u-4, 78u-5
21	“PSLRA Safe Harbor”	15 U.S.C. § 78u-5

INTRODUCTION

Plaintiff's case essentially is based on one statement in the proxy: "the Updated Case C Projections appeared to reflect a better estimate of Gigamon's long-term prospects" than the Case B Projections. That statement is a forward-looking statement immunized from liability by the PSLRA Safe Harbor. Plaintiff's opposition dances around, arguing that he does not attack the projections "*per se*", but rather, Defendants' *opinion* that the Updated Case C Projections were more likely. Opp. at 1, 11. Courts repeatedly have rejected such a disingenuous and artificial distinction, recognizing it as a transparent attempt to do an end-run around the Safe Harbor.

Plaintiff also tries to characterize his case as based on a material omission that rendered Defendants' opinion about the Updated Case Projections misleading under *Omnicare*. But the allegedly omitted "fact" is that Gigamon's Q4 2017 results turned out to be higher than predicted by the Updated Case C Projections. However Plaintiff characterizes it, this is a false forecast case alleging that the Updated Case C Projections were too pessimistic and the Safe Harbor applies. Moreover, no basis is pled to show that Defendants actually knew how Q4 would turn out when they filed the Proxy on November 24 or at any other time before the merger closed.

Even if the Safe Harbor does not apply, Plaintiff has not adequately alleged a claim. The only basis Plaintiff asserts to support an inference that the Updated Case C Projections were false is Gigamon’s May 3, 2018 press release, which stated only that Gigamon had a “record-setting close” in 2017. As Defendants explained, the Updated Case C Projections forecasted a record-setting close to 2017: they forecasted the highest quarterly revenues and the highest full year revenues in Gigamon’s history. Thus, the May 3 press release is consistent with the Updated Case C Projections. Plaintiff argues that, when this press release said “record-setting close,” these plain words should be read to mean “record-setting *year-over-year growth*.” Plaintiffs cannot rewrite the Company’s own words to invent a securities claim. It is Plaintiff’s burden to plead facts showing that the actual words used are *necessarily inconsistent with* the challenged statements, and Plaintiff has not and cannot meet that burden.

1 The Complaint fails to meet the PSLRA's exacting standards. Because amendment would
 2 be futile, the case should be dismissed with prejudice.

3 **I. THE COMPLAINT FAILS TO STATE A CLAIM BASED ON STATEMENTS
 4 ABOUT THE BOARD'S VIEWS OF THE DIFFERENT SETS OF PROJECTIONS**

5 **A. The Challenged Statements about Gigamon's Projections are Protected by
 6 the PSLRA Safe Harbor**

7 **1. The Challenged Statements Were Forward-Looking**

8 Defendants showed that the PSLRA Safe Harbor applies here. MTD at 12-13. Plaintiff
 9 challenges as false statements that "the Case C Projections appeared to reflect a better estimate
 10 of Gigamon's long-term prospects" than the Case B Projections (¶ 130(c), (d)). These are classic
 forward-looking statements under the PSLRA Safe Harbor. MTD at 12.¹

11 In response, Plaintiff argues that the Safe Harbor only applies in "fraud by hindsight"
 12 lawsuits "when forward-looking financial projections are subsequently missed." Opp. at 20.
 13 This is incorrect. The courts in both *FEI* and *Trahan* rejected this same argument because it
 14 "finds no support in the statutory text or judicial precedent." *Trahan v. Interactive Intelligence*
 15 *Grp., Inc.*, 308 F. Supp. 3d 977, 987 n.11 (S.D. Ind. 2018); *see City of Hialeah Emps.' Ret. Sys.*
 16 *v. FEI Co.*, 289 F. Supp. 3d 1162, 1171 (D. Or. 2018) ("The text of the statute does not support
 17 this narrow application" and "[p]laintiff cites no case law giving the [safe harbor] such a
 18 confined reading"). By its express language, the Safe Harbor applies in "any private action
 19 arising under [the Exchange Act] that is based on an untrue statement of a material fact or
 20 omission of a material fact necessary to make the statement not misleading." 15 U.S.C. § 78u-
 21 5(c)(1). Nothing in the statutory language limits the Safe Harbor to incorrect forecasts or to
 22 cases alleging "fraud by hindsight." Plaintiff fails to cite a single case so holding. Opp. at 20.

23 In any event, Plaintiff's theory here is logically no different from a fraud-by-hindsight
 24 case. Plaintiff contends that Defendants acted fraudulently when they stated that the Updated

25 ¹ Plaintiff also challenges the Board's present-tense statement that they believed the merger
 26 was fair but, as he concedes, this claim is based on his contention that the Updated Case C
 27 Projections were incorrect (Opp. at 8; ¶ 129). As shown herein, Plaintiff has failed to adequately
 28 plead that underlying contention. Thus, Plaintiff's challenge to the Board's opinion that the
 merger was fair also fails. *See Trahan v. Interactive Intelligence Grp., Inc.*, 308 F. Supp. 3d 977,
 998-99 (S.D. Ind. 2018) (dismissing attack on opinion that the merger was fair, which rested on
 the same inadequate allegations as plaintiff's attack on forecasts and other statements).

1 Case C Projections were their best estimate of Gigamon’s future because it allegedly turned out
 2 that the Case B Projections were closer to Gigamon’s results for Q4 2017 and fiscal 2017. *See*
 3 Opp. at 15, 17-18 (arguing that falsity is established by later statement that Gigamon had a
 4 “record close” to 2017); ¶¶ 136-137 (same). That is pure fraud-by-hindsight. *FEI*, 289 F. Supp.
 5 3d at 1171-72 (an attack on projections in a merger proxy is not meaningfully different from
 6 standard “fraud by hindsight” lawsuits). No facts are alleged showing that Defendants knew
 7 when they filed the Proxy that Case B allegedly would be the better forecast.

8 Plaintiff next argues that the Safe Harbor does not apply because Plaintiff does not
 9 challenge the truth of the projections themselves, but rather, the Board’s “contemporaneous
 10 beliefs” that the Updated Case C projections reflected a better estimate of Gigamon’s long-term
 11 prospects than the Case B Projections. Opp. at 21; *see also id.* at 11 (arguing that he challenges
 12 the Board’s *opinion* about which projections were more likely, and not the projections
 13 themselves). This argument rests upon a specious distinction that has been repeatedly rejected.
 14 As the court in *FEI* noted, every projection contains the inherent assertion that the person making
 15 the projection believes it. To accept “the view that an expression of ‘present belief’ in a forward-
 16 looking statement is a ‘present fact’—and therefore not itself a forward-looking statement—
 17 would work an end-run around the PSLRA’s safe harbor provision.” *FEI*, 289 F. Supp. 3d at
 18 1173; *see Grobler v. Neovasc Inc.*, No. 16-11038-RGS, 2016 U.S. Dist. LEXIS 161849, at *14
 19 (D. Mass Nov. 22, 2016) (rejecting same argument; “Virtually every statement about a future
 20 event could be said to imply a statement of present belief” but “a moment’s reflection” on the
 21 PSLRA safe harbor reveals that such statements are still forward-looking). Thus, “a defendant’s
 22 statement of its belief in or preference for a given projection is itself a forward-looking statement
 23 that is protected.” *FEI*, 289 F. Supp. 3d at 1173.²

24 _____

25 ² Plaintiff also seems to argue that the Safe Harbor does not apply because he alleges that the
 26 projections omitted information about *present* facts (Opp. at 20-21), but that does not remove
 27 Safe Harbor protection. The Ninth Circuit has repeatedly found the Safe Harbor applicable to
 28 projections that were alleged to be misleading by omission of current facts. *In re Cutera Sec.
 Litig.*, 610 F.3d 1103, 1106, 1111-12 (9th Cir. 2010); *Police Ret. Sys. v. Intuitive Surgical, Inc.*,
 759 F.3d 1051, 1057, 1058-59 (9th Cir. 2014); *see also M&M Hart Living Tr. v. Glob. Eagle
 Entm’t, Inc.*, No. CV 17-1479 PA (MRWx), 2017 U.S. Dist. LEXIS 182106, at *17 (C.D. Cal.
 Oct. 30, 2017) (safe harbor applied to projections even where plaintiffs did not allege the
 (continued...)

1 Plaintiff's cases are distinguishable. Opp. at 20-21. In both *NECA-IBEW Pension Trust*
2 *Fund v. Precision Castparts Corp.*, No. 3:16-cv-01756-01756-YY, 2017 WL 4453561 (D. Or.
3 Oct. 3, 2017) and *Laborer's Local #231 Pension Fund v. Cowan*, No. 17-478, 2018 WL 3243975
4 (D. Del. July 2, 2018), the target companies employed the primary growth strategy of acquiring
5 other companies. In spite of this, when the target companies themselves were acquired, their
6 boards used projections that *assumed no acquisitions* – in direct contravention of their
7 companies' stated business plans, and despite the fact that the companies continued to actively
8 pursue and close new acquisitions. *Precision*, 2017 WL 4453561, at *1-4; *Cowan*, 2018 WL
9 3243975, at *3-5, *11, *13. On these facts, the court in *Precision* found that the statement that
10 the forecasts “reflected management’s most up-to-date and accurate forecasts” (*Precision*, 2017
11 WL 4453561, at *6) was “properly construed as a present assessment of the company’s
12 intentions at the time of the proposed merger” – *i.e.*, it falsely conveyed a *present intention* to
13 abandon Precision’s acquisition strategy (*id.* at *11), and the proxy’s stated reasons for excluding
14 acquisitions from the forecasts was also a present-tense statement (*id.*). In *Cowan*, the court
15 found the plaintiff adequately alleged the falsity of the present tense statement that the board
16 believed that the banker’s fairness opinion was a “‘positive reason’ supporting its decision to
17 approve the merger,” because the board knew the fairness opinion rested on projections that
18 failed to account for the company’s acquisition-based strategy (*Cowan*, 2018 WL 3243975, at
19 *10, *34).³

20 Here, in contrast to *Precision* and *Cowan*, Plaintiff does not challenge any of the Proxy's
21 present-tense statements about the assumptions underlying the projections, or allege that the

³ Plaintiff's other cases are also inapposite. In *In re Quality Systems, Inc. Securities Litigation*, the Ninth Circuit held that the Safe Harbor did not protect the non-forward-looking portions of "mixed statements" that contained both present-tense aspects and forward-looking aspects, such as statements that the sales pipeline was "large" and "growing." 865 F.3d 1130, 1141-42, 1147 (9th Cir. 2017), *cert. dismissed*, – S. Ct. –, 2018 U.S. Dist. LEXIS 6933 (Nov. 27, 2018). Here, Plaintiff challenges projections, not mixed statements. In *Mulligan v. Impax Laboratories, Inc.*, the challenged statements were not forecasts but statements about the company's current efforts to respond to an FDA warning letter, such as a statement that tasks were "well under way." 36 F. Supp. 3d 942, 964 (N.D. Cal. 2014).

1 projections ignored the company's primary business strategy. Plaintiff challenges only the
 2 projections themselves and the Board's decision to favor the Updated Case C Projections over
 3 the Case B Projections. Opp. at 1, 15-16 (arguing the falsity of the Board's opinion is shown by
 4 the alleged falsity of the Updated Case C Projections). This is exactly like *FEI*, in which the
 5 plaintiff challenged the board's statement that a lower set of projections "were more likely to
 6 reflect the future business performance" of the company. 289 F. Supp. 3d at 1173 (citation
 7 omitted). Here, as in *FEI*, "[A] defendant's statement of its belief in or preference for a given
 8 projection is itself a forward-looking statement that is protected." *Id.*

9 Plaintiff also contends that the projections are not forward-looking statements because
 10 the Board selected the Updated Case C Projections "based on current information" (Opp. at 21-
 11 22) and "based on an assessment of the Company's then-current operative reality." *Id.* at 2. This
 12 argument is equally specious: *any* forecast necessarily relies on assumptions drawn from current
 13 information; the Safe Harbor expressly protects forecasts *and* assumptions. *See, e.g., Intuitive*,
 14 759 F.3d at 1059 (statements of present assumptions underlying projections also fall within safe
 15 harbor projection); *Wochos v. Tesla, Inc.*, No. 17-cv-05828-CRB, 2018 U.S. Dist. LEXIS
 16 145696, at *16 (N.D. Cal. Aug. 24, 2018) (rejecting the same argument; "[E]very future
 17 projection depends on the current state of affairs. Were the Court to adopt Plaintiffs' conclusion,
 18 the distinction between present statements and forward-looking statements would collapse."); *In*
 19 *re ECOTality, Inc. Sec. Litig.*, No. 13-03791-SC, 2014 U.S. Dist. LEXIS 130499, at *20 (N.D.
 20 Cal. Sept. 16, 2014) ("To some extent, every prediction, projection, or forward-looking statement
 21 must be based on current conditions, unless it is totally divorced from reality."). Plaintiff's
 22 arguments would eliminate the protections of the Safe Harbor and must be rejected.

23 Finally, Plaintiff cannot salvage a claim by mischaracterizing what Defendants said.
 24 Plaintiff asserts that the Proxy told investors that the Updated Case C Projections were the
 25 projections "to rely on" "at the time of the Merger." Opp. at 1; *see id.* at 12-13, 20-21. To the
 26 contrary, the Proxy in boldface text explicitly warned investors *not* to rely on the forecasts.
 27 Gavin Decl. Ex. 1 at 59; *see* MTD at 14. The Proxy stated that the forecasts were being
 28 disclosed because they had been given to bidders and Goldman Sachs, and that management

1 believed the projections were reasonable *at the time they were prepared*. The Proxy further
2 cautioned that Defendants “do not intend to update or otherwise revise” the forecasts “to reflect
3 circumstances existing after the date when made.” Gavin Decl. Ex. 1 at 59; *see id.* at 58 (the
4 forecasts “should not be relied upon as being necessarily indicative of actual future results.”). In
5 *Cowan*, upon which Plaintiff relies, the court held that a plaintiff could not state a Section 14(a)
6 claim based on forecasts in a proxy where the proxy contained warnings almost identical to those
7 here. 2018 WL 3243975, at *17-23. As in *FEI* and *Cowan*, Plaintiff cannot sustain a claim
8 based upon the Updated Case C Projections.

2. The Statements Were Identified as Forward-Looking and Accompanied by Meaningful Cautionary Language

11 Defendants demonstrated that the challenged statements were identified as forward-
12 looking and accompanied by meaningful cautionary language. MTD at 13-14. Plaintiff does not
13 dispute this. *See Opp.* at 22 n.12 (arguing only that challenged statements were not forward-
14 looking). The Safe Harbor therefore applies and immunizes the challenged statements. MTD at
15 13-14.

3. The Safe Harbor Applies for the Independent Reason that Plaintiff Fails to Adequately Allege Actual Knowledge of Falsity

18 Defendants demonstrated that the Safe Harbor’s independent second prong also protects
19 the challenged statements because the Complaint fails to allege particularized facts giving rise to
20 a strong inference that Defendants had *actual knowledge* that the statements were false when
21 made. *Id.* at 15. In response, Plaintiff argues that negligence is the applicable standard, even for
22 forward-looking statements. The only authority Plaintiff cites for this proposition is one
23 sentence of dicta in the unpublished decision *Knollenberg v. Harmonic, Inc.*, 152 F. App’x 674,
24 682 (9th Cir. 2005). Opp. at 6. *Harmonic* did not involve an attack on forward-looking
25 statements and did not address the application of the PSLRA Safe Harbor to the Section 14(a)
26 claims. 152 F. App’x at 682-83. Moreover, the only authority *Harmonic* cited for its dicta was
27 *In re McKesson HBOC, Inc. Securities Litigation*, 126 F. Supp. 2d 1248, 1267 (N.D. Cal. 2000),
28 but *McKesson* did not discuss application of the PSLRA Safe Harbor. In published decisions

1 squarely addressing the Safe Harbor, the Ninth Circuit has repeatedly held that *actual knowledge*
 2 of falsity is required for forward-looking statements. *Quality Sys.*, 865 F.3d at 1149; *Cutera*, 610
 3 F.3d at 1112-13; *In re Daou Sys., Inc.*, 411 F.3d 1006, 1021 (9th Cir. 2005). Here, Plaintiff's
 4 failure to allege particularized facts inferring actual knowledge of falsity (*infra* p. 13) triggers the
 5 Safe Harbor's protection. MTD at 15.

6 **B. Plaintiff Does Not Adequately Allege a False or Misleading Statement of
 7 Opinion**

8 **1. Plaintiff Fails to Plead Specific Facts Showing Both Objective and
 9 Subjective Falsity**

10 As Defendants showed, even if the challenged statements are not protected by the Safe
 11 Harbor, Plaintiff fails to adequately allege that the statements were false or misleading. *Id.* at 16-
 12 20. Plaintiff fails to allege facts showing both subjective and objective falsity—that the Updated
 13 Case C Projections were objectively incorrect when made, and that Defendants did not
 14 subjectively believe in them. *Id.* Plaintiff responds that, under *Omnicare, Inc. v. Laborers
 15 District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), he only needs to
 16 plead the existence of a material omission that renders Defendants' opinion misleading. Opp. at 8.
 Plaintiff is wrong.

17 *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), is directly on point and
 18 controlling. There, the Supreme Court squarely held that a Section 14(a) claim attacking an
 19 opinion in a proxy statement for a shareholder vote on a merger requires the plaintiff to show *both*
 20 that the opinion was not actually believed *and* was objectively false. *Id.* at 1096 (“We therefore
 21 hold disbelief or undisclosed motivation, standing alone, insufficient to satisfy the element of fact
 22 that must be established under § 14(a)” and proof of objective falsity is also required). Nothing in
 23 *Omnicare* suggests that the Court was overruling the rule for Section 14(a) cases established by
 24 *Virginia Bankshares*. To the contrary, *Omnicare* cited *Virginia Bankshares* as the controlling law
 25 “when corporate directors’ statements of opinion in a proxy solicitation give rise to liability under
 26 § 14(a).” *Omnicare*, 135 S. Ct. at 1326 n.2. Thus, after *Omnicare*, courts continue to apply the
 27 subjective/objective falsity test from *Virginia Bankshares* to Section 14 claims attacking opinion
 28 statements. *See* MTD at 15; *FEI*, 289 F. Supp. 3d at 1175; *Trahan*, 308 F. Supp. 3d at 987, 990.

1 Indeed, even Plaintiff’s cited cases applied the *Virginia Bankshares* requirement of both objective
2 and subjective falsity. Opp. at 12-13; *Precision*, 2017 WL 4453561, at *7 (“[M]isleading opinions
3 give rise to a claim ‘only if the complaint alleges with particularity that the statements were both
4 objectively and subjectively false or misleading.’” citation omitted)); *In re Hot Topic, Inc. Sec.
5 Litig.*, No. CV 13-02939 SJO (JCx), 2014 WL 7499375, at *5 (C.D. Cal. May 2, 2014)
6 (“[P]laintiff must not only allege that the defendants subjectively believed their statements were
7 false, but also that the statements were objectively false.”). Plaintiff’s suggestion that *Virginia
8 Bankshares* only applies to allegedly false statements, not statements allegedly misleading by
9 omission (Opp. at 12), is also incorrect. *Virginia Bankshares* dealt directly with omissions. 501
10 U.S. at 1094 (discussing misleading nature of opinion statement because of “facts omitted from
11 the statement”); *see id.* at 1098.⁴ Plaintiff must, but has not, alleged both objective and subjective
12 falsity.

a. Plaintiff Fails to Plead that the Updated Case C Projections Were Objectively False

15 Plaintiff has no legitimate factual basis to assert that the Updated Case C Projections were
16 objectively false. *First*, Plaintiff argues that more optimistic statements made by Gigamon earlier
17 in 2017 show that the Updated Case C Projections were false. MTD at 17. Defendants showed,
18 however, that those optimistic statements were made well before the surprisingly poor third
19 quarter. These earlier statements thus cannot satisfy the PSLRA requirement that Plaintiff plead
20 particularized *contemporaneous facts* showing that the challenged statement was false when made.
21 *Id.* at 16-17; *Trahan*, 308 F. Supp. 3d at 990-91. Plaintiff offers no response, and merely reiterates
22 his inadequate allegations. Opp. at 10, 16 n.7.

23 *Second*, Plaintiff argues that Gigamon’s May 3, 2018 press release, stating that Gigamon
24 had a “record-setting close . . . in 2017,” demonstrates that the Updated Case C Projections were

26 ⁴ Plaintiff cites *Cowan* as an example of a Section 14 case applying *Omnicare*. Opp. at 9.
27 But *Cowan* incorrectly did not even consider *Virginia Bankshares*. 2018 WL 3243975, at *9.
28 Plaintiff's citation to *MetLife* is wholly inapposite as the case did not concern Section 14(a); the
court applied *Omnicare* to a Section 10(b) claim that defendant had inadequate death-benefit
reserves. Opp. at 9; *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, No. 12-cv-0256
(LAK), 2016 WL 6652731, at *7, *10 (S.D.N.Y. Nov. 10, 2016).

1 false when made. MTD at 16-17. But as Defendants showed, the Updated Case C Projections *did*
 2 forecast a record-setting close to 2017 – specifically, the highest quarterly and yearly revenues in
 3 Gigamon’s history. *Id.* at 9, 16. Thus, the May 3, 2018 press release is consistent with the
 4 Board’s statement that the Updated Case C Projections appeared to reflect a better estimate of
 5 Gigamon’s long-term prospects. *Id.* at 16-17. And, in any event, Plaintiff has not pleaded any
 6 *contemporaneous* facts showing that the Updated Case C Projections were false when made.

7 Plaintiff cannot escape by arguing that Defendants are making an “improper factual
 8 argument.” Opp. at 17. It is Plaintiff’s burden to plead, with particularity, specific
 9 contemporaneous facts that contradict or are “necessarily inconsistent with” the challenged
 10 statements. *In re Read-Rite Corp.*, 335 F.3d 843, 848 (9th Cir. 2003), *abrogated on other grounds*
 11 *as recognized in S. Ferry, L.P. No. 2 v. Killinger*, 542 F.3d 776, 782-84 (9th Cir. 2008); *see also*
 12 *Ronconi v. Larkin*, 253 F.3d 423, 433 (9th Cir. 2001) (plaintiff failed to allege falsity based on
 13 company’s later statement where the later statement was not inconsistent with prior statement).
 14 Plaintiff points to the May 3 statement. But that statement is not “necessarily inconsistent with”
 15 the challenged Updated Case C Projections, which predicted a “record-setting close” to 2017.
 16 Plaintiff’s failure to meet his pleading burden is fatal to his claim. *Read-Rite*, 335 F.3d at 848.
 17 MTD at 9, 16.⁵

18 Plaintiff does not dispute that the Updated Case C Projections projected “record-setting”
 19 revenues for Q4 2017 and FY 2017. MTD at 16. Plaintiff instead suggests the Court should read
 20 the plain words in the May 3 press release to mean something different than what they say.
 21 According to Plaintiff, the phrase “record-setting close” should be blue-penciled and read to mean
 22 “record-setting *year-over-year growth*.” Opp. at 17. That is not what the press release stated.
 23 ¶ 12. The press release specifically spoke about year-over-year growth for Q1 2018, but pointedly
 24 *did not say* that Gigamon had *record year-over-year growth* in either Q4 2017 or Q1 2018. *Id.*

25 ⁵ Plaintiff’s reliance on *Azar v. Blount Int’l, Inc.*, No. 3:16-cv-483-SI, 2017 U.S. Dist. LEXIS
 26 39493 (D. Or. Mar. 20, 2017) (Opp. at 17) is misplaced. There, management allegedly prepared
 27 downgraded projections to justify a merger while continuing to rely on more optimistic
 28 projections and telling buyers they “anticipated improved third quarter results and [had] greater
 certainty that the Company would meet year-end targets.” *Blount*, 2017 U.S. Dist. LEXIS 39493,
 at *7-8, *13. Plaintiff here makes no similar allegations of *contemporaneous* facts suggesting
 that the Updated Case C Projections were inaccurate (nor could he).

1 Indeed, Plaintiff's proposed reading is demonstrably wrong. Record-setting year-over-year
 2 growth would have exceeded 40%. *See* MTD at 7. No facts are pled suggesting that Gigamon
 3 achieved or predicted 40% growth in 2017. Heading into Q3, after only 4% growth in Q1 and
 4 negative 8% growth in Q2, Gigamon guided to 3% growth in Q3 and said that it hoped to return to
 5 only 20%-25% growth in Q4 (*id.*; ¶¶ 91, 99); and, Gigamon missed Q3 guidance, reporting
 6 negative 5% growth (MTD at 7; ¶ 111). Indeed, even the Case B projections created in June 2017
 7 that Plaintiff claims are the right projections predicted only 32% growth. MTD at 7, 9.

8 Plaintiff's argument that the May 3 press release *might* be interpreted as inconsistent with
 9 the Updated Case C Projections underscores the inadequacy of the Complaint. The PSLRA
 10 requires Plaintiff to allege particularized facts that "*directly contradict*" or are "*necessarily*
 11 *inconsistent with*" the challenged statement. *Read-Rite*, 335 F.3d 843, 848 (emphasis added); *id.*
 12 at 846 (falsity may be shown by a later statement "if the later statement directly contradicts or is
 13 inconsistent with the earlier statement"); *Ronconi*, 253 F.3d at 432 (later statements did not show
 14 falsity where they were "not necessarily inconsistent with" earlier statements). There is no factual
 15 basis pled, or reasonable basis to believe, that after its difficult 2017 Gigamon somehow soared to
 16 stratospheric growth in Q4 that pulled the overall 2017 growth rate above 40%. Plaintiff cannot
 17 distort plain language in an effort to allege falsity. *See West v. eHealth, Inc.*, No. 3:15-cv-00360-
 18 JD, 2016 U.S. Dist. LEXIS 33429, at *7-9, *18-19 (N.D. Cal. Mar. 14, 2016) (later statement that
 19 company saw "pronounced deviations" in churn did not show falsity of prior statements that churn
 20 was "not 'out of the ordinary'" and "in line with . . . norms"; Plaintiffs must allege facts showing
 21 that statement "was objectively false when made, not simply that it *could be* false under plaintiffs'
 22 adopted definition." (emphasis added)); *In re Jones Soda Co. Sec. Litig.*, No. C07-1366 RSL, 2009
 23 U.S. Dist. LEXIS 9297, at *15-17 (W.D. Wash. Feb. 9, 2009) (later statement that company was
 24 "now investing" does not mean company had not previously invested); *see also Yourish v. Cal.*
 25 *Amplifier*, 191 F.3d 983, 996-97 (9th Cir. 1999) (statement that large shipments would not be
 26 repeated did not contradict prior statement that company expected "significant follow-along
 27 business"); *Hampton v. Root9B Techs., Inc.*, 897 F.3d 1291, 1301 (10th Cir. 2018) (although
 28 possible that facts alleged contradicted defendant's statements, facts alleged must be, and were

1 not, “inherently inconsistent” with statements); *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540
 2 F.3d 1049, 1064-65 (9th Cir. 2008) (plaintiffs’ proposed interpretation of disclosures was not
 3 “fact” that must be accepted as true but unwarranted inference).

4 In fact, even under Rule 8’s relaxed pleading standard, a plaintiff must allege facts
 5 showing a *plausible* claim, not just a *possibility*. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557,
 6 570 (2007) (Rule 8 requires facts showing claims are plausible, not merely a “possibility” or
 7 “conceivable”). The Complaint is devoid of a single contemporaneous factual allegation
 8 supporting the speculation that Gigamon achieved *record year-over-year growth* in Q4 2017.
 9 Plaintiff’s allegations thus fail even the *Twombly* plausibility test (*id.* at 570), and fall far short of
 10 satisfying the requirements of Rule 9(b) and the PSLRA applicable here. *Read-Rite*, 335 F.3d at
 11 848.⁶

12 **b. Plaintiff Fails to Plead that Defendants Did Not Believe that
 13 the Updated Case C Projections Reflected a Better Estimate of
 Gigamon’s Long-Term Prospects**

14 Defendants demonstrated that Plaintiff fails to allege facts showing subjective falsity—that
 15 Defendants did not believe that the Updated Case C Projections reflected a better estimate of
 16 Gigamon’s long-term prospects than the Case B Projections. MTD at 17-20. Plaintiff’s theory
 17 that the Board’s decision to use the Updated Case C Projections was “sudden and unsupported”
 18 ignores the economic reality of Gigamon’s poor performance during 2017 and mischaracterizes
 19 the Proxy’s description of events. *Id.* at 18-20. Plaintiff ignores Defendants’ arguments, instead
 20 simply repeating his mischaracterizations of the Proxy. Opp. at 14-16.

21 For example, Plaintiff asserts that the Board’s decision to use the Updated Case C
 22 Projections was “sudden” (*id.* at 14) because the Board supposedly reaffirmed the Case B
 23 Projections on October 14, 2017, knowing of poor Q3 2017 results, only to reject them on October
 24, 2017 to justify Elliott’s offer. *Id.* at 14-15, 18. No fact alleged in the Complaint or stated in
 25 the Proxy suggests that the Board reaffirmed the Case B projections on October 14. To the

26 ⁶ Plaintiff also disingenuously argues that the Court should penalize Defendants for failing to
 27 disclose Gigamon’s Q4 2017 revenues in their motion papers (Opp. at 18), while simultaneously
 28 arguing that Defendants are not allowed to introduce factual evidence (*id.* at 17). The pleading
 burden is squarely on Plaintiff, and Defendants have no evidentiary burden. *See Tellabs, Inc. v.
 Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007).

1 contrary, the Proxy states that on October 5, 2017, the Board conclusively determined that the
 2 Case B Projections “could no longer be relied upon” and “were outdated due to actual second and
 3 third quarter performance and the trend lines that such results suggested for the full year and
 4 beyond.” Gavin Decl. Ex. 1 at 41. In fact, the Proxy reflects that the Board had concerns about
 5 the reliability of the Case B Projections on September 21, 2017, when management reported
 6 “troubling signs of softening” in the quarter. *Id.* at 40. No facts are alleged to support an
 7 inference that the Board suddenly decided to use the Updated Case C Projections. Opp. at 14.

8 Plaintiff’s argument that the Board’s only reason for using the Updated Case C Projections
 9 was to placate Elliott likewise fails for lack of factual allegations. *Id.* at 14-15. No facts are
 10 alleged plausibly suggesting that Defendants’ motivation for favoring the Updated Case C
 11 Projections was anything *other than* a good faith assessment of the economic realities. *Id.*

12 As Defendants showed, this case is almost exactly like *FEI*, 289 F. Supp. 3d 1162. MTD
 13 at 19-20. Plaintiff ignores *FEI*, relying instead on *Hot Topic* (Opp. at 12-13, 19), which is readily
 14 distinguishable. In *Hot Topic*, defendants relied on a set of lower projections even though, prior to
 15 the merger, Hot Topic had “consistently met or exceeded its own projections and goals” (*Hot*
 16 *Topic*, 2014 U.S. Dist. LEXIS 180513, at *4); here, however, Plaintiff concedes that Gigamon’s
 17 growth slowed drastically and that it missed its guidance for Q4 2016, Q2 2017, and Q3 2017
 18 (¶¶ 56, 111; Opp. at 14). Moreover, in *Hot Topic*, defendants negotiated a separate deal to remain
 19 invested in the company after the merger, suggesting they did not believe the merger price was
 20 adequate. 2014 U.S. Dist. LEXIS 180513, at *7-8. *Precision*, upon which Plaintiff also relies
 21 (Opp. at 13), is also inapposite. *Supra* p. 4.

22 Plaintiff fails to meet his burden to allege subjective and objective falsity.

23 **2. Plaintiff Fails to Allege a Claim Under *Omnicare***

24 Even under *Omnicare*, Plaintiff’s allegations would be woefully inadequate. *Omnicare*
 25 made clear that the securities laws do “not allow investors to second-guess inherently subjective
 26 and uncertain assessments.” 135 S. Ct. at 1327. “Reasonable investors understand that opinions
 27 sometimes rest on a weighing of competing facts” and therefore it is “not necessarily misleading
 28 when an issuer knows, but fails to disclose, some fact cutting the other way.” *Id.* at 1329.

1 Plaintiffs must allege omitted facts that “conflict with what a reasonable investor would take from
 2 the statement itself,” such as facts showing that the speaker “failed to conduct *any* investigation”
 3 to support the opinion or was aware of facts “which would *preclude such an opinion.*” *Id.* at 1329,
 4 1330 (emphasis added). “That is no small task for an investor.” *Id.* at 1332.

5 Plaintiff here comes nowhere close. Plaintiff does not allege that Defendants failed to
 6 conduct an investigation or failed to thoroughly review Gigamon’s economic situation before
 7 deciding that the Updated Case C Projections appeared to reflect a better estimate of Gigamon’s
 8 long-term prospects. Rather, he suggests that “Gigamon’s performance had markedly improved”
 9 in Q4 2017, making the poor Q3 2017 results an “outlier.” Opp. at 9-11. This is not a fact, but
 10 merely an unsupported *conclusion* drawn incorrectly from the May 3, 2018 press release. *Id.* at 9.
 11 As discussed above, the May 3 press release is consistent with the Updated Case C Projections,
 12 which projected a “record-setting close.” *Supra* p. 8-9. Plaintiff has failed to identify any omitted
 13 fact that “would preclude” Defendants’ opinion, as required under *Omnicare*. 135 S. Ct. at 1329-
 14 30; *see, e.g.*, *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856
 15 F.3d 605, 619 (9th Cir. 2017) (where allegation was “not a *fact*, but rather Plaintiff’s *conclusion*”
 16 it “cannot serve as an omission of fact that sufficiently pleads falsity.”).

17 **II. PLAINTIFF FAILS TO ALLEGE PARTICULARIZED FACTS GIVING RISE TO
 18 A STRONG INFERENCE OF THE REQUIRED STATE OF MIND**

19 Plaintiff fails to allege facts giving rise to a strong inference of actual knowledge of
 20 falsity. MTD at 23. Plaintiff responds that Defendants knew by the date of the shareholder
 21 meeting (December 22, 2017) that Q4 2017 results would be higher than the Updated Case C
 22 Projections. *See* Opp. at 1, 10, 22. Plaintiff pleads no basis to allege that Q4 2017 results *were*
 23 higher than the Updated Case C Projections, let alone that Defendants knew this by December 22.
 24 He cites no internal documents, no confidential witnesses, no contemporary contrary statements
 25 by management or anyone else, to support the theory. His *sole* support, the May 3, 2018 press
 26 release, does not support his theory. *Supra* p. 8-11. Plaintiff further fails to allege facts
 27 supporting his speculation that Defendants would have known of Q4 results by December 22.
 28 Indeed, Plaintiff concedes (a) that Gigamon had a history of missing revenue projections (¶¶ 56,

1 111; Opp. at 14), (b) that Gigamon experienced spikes in bookings late in the quarter (¶ 91), and
 2 (c) that Q3 17 quarter-end results were not available internally until the quarter ended (¶ 111).
 3 Thus, there is no basis to infer that Q4 2017 results differed from the Updated Case C Projections
 4 or were known until after quarter-end.

5 Even under a negligence standard, Plaintiff is required to allege facts giving rise to a
 6 *strong inference* of negligence and fails to do so. MTD at 23-24. Plaintiff's citation to a 7th
 7 Circuit case to argue that the strong inference standard does not apply (Opp. at 6) is inapposite;
 8 courts in the Ninth Circuit require a strong inference of negligence, as Plaintiff's own authorities
 9 show. *See Blount*, 2017 WL 1055966, at *9 (cited in Opp. at 7, 16, 17) ("a Section 14(a) plaintiff
 10 must plead with particularity facts that give rise to a strong inference of negligence" (quoting
 11 *Harmonic*, 152 Fed. App'x at 683 (cited in Opp. at 6)); *Precision*, 2017 WL 4453561, at *12-13
 12 (same) (cited *passim* in Opp.); *Kelley v. Rambus, Inc.*, No. C 07-1238 JF (HRL), 2008 U.S. Dist.
 13 LEXIS 100319, at *11 (N.D. Cal. Dec. 9, 2008) (same) (cited in Opp. at 7).

14 Plaintiff cites *Brown v. Brewer*, No. CV 06-3731-GHK (SHx), 2010 WL 2472182 (C.D.
 15 Cal. June 17, 2010), for the proposition that he only needs to allege falsity and the director's
 16 opportunity to review and edit the proxy to allege negligence. Opp. at 7. That is wrong, and to
 17 the extent *Brown* can be read to support that proposition, it is incorrect. *Brown* was a summary
 18 judgment case in which the plaintiff had sufficient evidence to raise triable issues on both material
 19 omissions in the proxy and each director's involvement. 2010 WL 2472182, at *25. It did not
 20 address PSLRA pleading standards and relied on pre-PSLRA cases decided in the Second Circuit.
 21 *Id.* at *24.⁷ The PSLRA requires more than allegations of falsity and an opportunity to review and
 22 edit the proxy. For example, in *Blount*, 2017 WL 1055966, at *9 (cited in Opp. at 7), plaintiff
 23 alleged the directors "improperly deferred" to management "whom they knew to be conflicted,"
 24 had conflicted bankers prepare the financial analyses, and omitted entire sets of projections from
 25

26 ⁷ Plaintiff mischaracterizes *Kelley v. Rambus*, which did *not* hold that it was sufficient to
 27 allege a misstatement coupled with each director's position (Opp. at 7). The court in *Kelley*
 28 dismissed plaintiffs' claims, and said plaintiffs "might be able to establish a strong inference
 of . . . negligence" "if Plaintiffs could provide more detailed facts" about the underlying alleged
 misconduct. 2008 U.S. Dist. LEXIS 100319, at *24 (emphasis added).

1 the proxy. *See also, e.g., In re Maxim Integrated Prods.*, 574 F. Supp. 2d 1046, 1062-63, 1066
 2 (N.D. Cal. 2008) (cited in Opp. at 8) (allegations that all directors approved backdated options and
 3 most received backdated options, which the proxy misrepresented); *McKesson*, 126 F. Supp. 2d at
 4 1267 (plaintiff failed to adequately allege negligence where no factual allegations suggested that
 5 defendants “could have known, even with reasonable diligence,” about the “massive accounting
 6 fraud.”). Here, Plaintiff has not alleged the directors improperly deferred to conflicted
 7 management, or that any director shirked his or her duties to, for example, carefully consider
 8 management’s reports on the state of the company before selecting between the different sets of
 9 projections. More is required, and Plaintiff has failed to allege facts giving rise to a strong
 10 inference of negligence.⁸

11 **CONCLUSION**

12 For all of the foregoing reasons, the Court should dismiss Plaintiff’s Complaint with
 13 prejudice.

14 DATED: January 14, 2019

15 WILSON SONSINI GOODRICH & ROSATI
 16 PROFESSIONAL CORPORATION

17 s/ Jerome F. Birn, Jr.
 18 JEROME F. BIRN, JR.

19 *Attorneys for the Gigamon Defendants*

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 28 ⁸ Defendants also explained that Plaintiff failed to allege his additional claims that the Proxy omitted various additional details about the projections and Board discussions. MTD at 20-23. Plaintiff does not dispute that he has failed to adequately allege these claims.

1 **ATTESTATION**

2 I, Elizabeth R. Gavin, am the ECF User whose identification and password are being used
3 to file the Gigamon Defendants' Request for Judicial Notice and Incorporation by Reference. In
4 compliance with Civil Local Rule 5-1, I hereby attest that Jerome F. Birn, Jr. concurred in this
5 filing.

6
7 DATED: January 14, 2019

8 s/ Elizabeth R. Gavin
9 Elizabeth R. Gavin

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